

Human Rights Watch v Secretary of State for the Foreign and Commonwealth Office: Victim Status, Extraterritoriality and the Search for Principled Reasoning

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*Human Rights Watch v Secretary of State for the Foreign and
Commonwealth Office: Victim status, extraterritoriality and the search for
principled reasoning*

Lea Raible^{*}

Modern Law Review (forthcoming)

Abstract: In *Human Rights Watch v Secretary of State for the Foreign and Commonwealth Office* the UK Investigatory Powers Tribunal found that the relevant standard of ‘victim status’ that applies in secret surveillance cases consists in a potential risk to be subjected to surveillance and that the European Convention on Human Rights does not apply to the surveillance of individuals who reside outside of the UK. This note argues that the Tribunal’s finding regarding the victim status of the applicants was sound but that the underlying reasoning was not. The note further concludes that the Tribunal’s finding on extraterritoriality is unsatisfactory and that its engagement with the European Court of Human Rights case law on the matter lacked depth. Finally, the note considers the defects of *Human Rights Watch* and the case law on extraterritoriality more generally against the backdrop of the place of principled reasoning in human rights adjudication.

Key words: European Convention on Human Rights, Regulation of Investigatory Powers Act 2000, victim status, extraterritoriality, surveillance, privacy

A INTRODUCTION

Have you ever made a phone call, sent an email, or, you know, used the internet [sic]? Of course you have!

^{*} PhD Candidate, Faculty of Laws, University College London. I am grateful to Joe Atkinson, Raquel Barradas de Freitas, Alex Green, Colm O’Cinneide, Eugenio Velasco and two anonymous referees for their helpful comments and suggestions. Responsibility for the views expressed, of course, remains mine alone.

Chances are, at some point, your communications were swept up by the U.S. National Security Agency's [NSA] mass surveillance program and passed on to Britain's intelligence agency GCHQ [Government Communications Headquarter].¹

These are the first lines of an entry on the website of the Privacy International Campaign.² It was set up by the charity so that individuals could apply to the UK Investigatory Powers Tribunal's (IPT or Tribunal) to find out if they had been subject to unlawful surveillance. The IPT is a court that adjudicates complaints about secret surveillance by public authorities, either because the measures are unlawful or because they are in breach of human rights. The aforementioned campaign led to 663 complaints by NGOs and individuals both from within and from outside the UK. In *Human Rights Watch v Secretary of State for the Foreign and Commonwealth Office*³ (*Human Rights Watch*) the IPT considers two preliminary issues related to these complaints: standing and the extraterritorial application of the European Convention on Human Rights (ECHR or Convention). The Tribunal decided that all applicants have standing provided they supply further information. But it also found, problematically, that the ECHR was not applicable to individuals abroad even if they have been subject to government surveillance.

Who should be considered to have standing in a claim regarding the violation of privacy by alleged government surveillance is a difficult issue due to the measure's necessary secrecy. Surveillance for the purposes of gaining intelligence is only effective if it is unknown to the target. If a targeted individual knows that their communications are being monitored, they may adapt their behaviour and thus distort any intelligence gathered. The legal flipside is that individuals must be able to complain about covert surveillance even if they cannot prove that they are subject to such a measure. Demanding that applicants show that they meet the usual ECHR standard of being 'directly affected' would render judicial oversight impossible by definition.⁴ The European Court of Human Rights (ECtHR or Court) and also the IPT in *Human Rights Watch* discuss the standard under the heading of 'victim status'.

¹ *Human Rights Watch and others v Secretary of State for the Foreign and Commonwealth Office and others* [2016] UKIPTrib 15_165-CH at [7].

² The campaign has since been suspended. See <https://www.privacyinternational.org/illegalspying> (last accessed 23 August 2016).

³ n 1 above.

⁴ *Zhakarov v Russia* (2016) 63 EHRR 17.

‘Extraterritoriality’ or ‘extraterritorial application’ denotes the issue of whether the ECHR applies to individuals abroad. In essence, the question is if and when states owe human rights obligations to individuals outside their territory.⁵ Following the wording of the Convention the discussion turns on the interpretation of the term ‘jurisdiction’. The IPT thus frames the question as follows: is a person brought within UK jurisdiction when they are subjected to surveillance by the UK Government even though they are not within UK territory and not directly under the control of the UK? This is a thorny issue in the context of privacy. Digital communications do not respect national borders and neither does government surveillance of such communications. It is thus difficult to make a case that someone’s location should make a difference to whether or not they are owed respect for their private life according to article 8 ECHR.

Questions on victim status and extraterritoriality arise regularly in the context of rights to privacy and mass surveillance. Accordingly, a pronouncement of a specialised tribunal on these issues is bound to have profound impact. In addition, *Human Rights Watch* is, as far as the author is aware, the first time that a UK court has ruled on the applicability of the ECHR regarding government surveillance abroad and thus represents a major development in the area. An Investigatory Powers Bill that increases powers to intercept and retain data in bulk⁶ means that these issues are as relevant and topical as they could be, and will remain so for the foreseeable future. The findings in *Human Rights Watch* are controversial and have swiftly been criticised by commentators.⁷ As the Tribunal’s rulings are not subject to direct appeal in the UK it is highly likely that its decision will be challenged before the ECtHR.⁸

This note argues that the IPT’s finding regarding the victim status of the applicants is largely (but not fully) correct when considered against the ECHR, but that the same

⁵ M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press 2011) 8.

⁶ At the time of drafting the latest available document was Investigatory Powers HL Bill (2016-2017) 62. A problematic example in terms of bulk data interception and retention is section 84, which provides for Internet connection data to be retained in bulk and accessible to government agencies without a warrant. In addition, parts 6 and 7 of the Bill introduce potentially extensive bulk warrants.

⁷ M. Milanovic, ‘UK Investigatory Powers Tribunal Rules that Non-UK Residents Have No Right to Privacy under the ECHR’ *EJIL:Talk!* 18 May 2016 at <http://www.ejiltalk.org/uk-investigatory-powers-tribunal-rules-that-non-uk-residents-have-no-right-to-privacy-under-the-echr/> (last accessed 23 August 2016); S. Kim ‘ECHR Jurisdiction and Mass Surveillance: Scrutinising the UK Investigatory Power Tribunal’s Recent Ruling’ *EJIL:Talk!*, 9 June 2016 at <http://www.ejiltalk.org/echr-jurisdiction-and-mass-surveillance-scrutinising-the-uk-investigatory-power-tribunals-recent-ruling/> (last accessed 23 August 2016).

⁸ Kim n 7 above.

cannot be said for its finding regarding extraterritorial jurisdiction. Furthermore, the judgment as a whole raises serious questions concerning the place of principled reasoning in human rights adjudication and in the on-going debate about the frontiers of human rights. The note begins with a sketch of the facts and the background of the case. In its second and third parts, it addresses the Tribunal's reasoning and findings relating to victim status and extraterritoriality with regard to the case law of the ECtHR. The fourth part considers a deeper question: why did the Tribunal fail as it did? To answer this, the note explores the place of principled reasoning in human rights adjudication both before the ECtHR and in the domestic context.

A BACKGROUND

The IPT considers two kinds of applications. The first kind are claims under section 7 of the Human Rights Act 1998 (HRA 1998) as set out by section 65(2)(a) of the Regulation of Investigatory Powers Act 2000 (RIPA 2000). With regard to these claims the IPT is required to act according to section 2 of the HRA 1998 and thus to 'take into account' ECtHR decisions and judgments. The second kind of applications is complaints against secret measures regulated by RIPA 2000. These are domestic law complaints according to section 65(2)(b) of RIPA 2000 against conduct of public authorities, such as intelligence services. Individuals can complain about any alleged failure to act lawfully or to follow internal procedure by such public authorities.

After the Snowden revelations in 2013, several non-governmental organisations, including Privacy International, applied to the IPT in order to challenge the UK Government's surveillance regime concerning bulk data interception.⁹ They challenged that UK intelligence services had access to data collected by the NSA under PRISM, which provided for the collection of data from companies such as Yahoo and Google,¹⁰ and a bundle of programmes referred to as Upstream, under which data was intercepted from fibre optic cables.¹¹ Further, they challenged a UK programme called Tempora, under which the GCHQ intercepted data from cables landing in the UK.¹² Liberty/Privacy No 2 found that the arrangements of intelligence

⁹ n 1 above at [3]. See further *ibid.*

¹⁰ M. Rispoli, 'Looking at PRISM', 7 June 2013 <https://www.privacyinternational.org/node/267> (last accessed 23 August 2016).

¹¹ Kim n 7 above.

¹² n 1 above at [3]. On Tempora see E. MacAskill and others, 'GCHQ Taps Fibre-optic Cables for Secret Access to World's Communication' *The Guardian* 21 June 2013.

sharing under PRISM and Upstream were unlawful and contravened article 8 ECHR prior to the disclosures in the same judgments.¹³ Liberty/Privacy No 3 found that Tempora, the system operated pursuant to section 8(4) of RIPA 2000 warrants, was legal and complied with the ECHR.¹⁴

After these findings were published, Privacy International launched the campaign mentioned above. 663 applications were made through the campaign webpage, each of which contained both a human rights claim and a domestic law complaint.¹⁵ They asserted that the applicants believed to be affected by either information sharing according to PRISM and Upstream and/or by Tempora and challenged the lawfulness of these measures under the ECHR or RIPA 2000 and internal procedures respectively.¹⁶ The judgment in *Human Rights Watch* followed a request of the Respondents to dismiss all applications based on the fact that the proceedings in Liberty/Privacy had resolved any future applications (including the ones before the Tribunal now) on the same issues.¹⁷ It dealt with the first ten of the applications in order to determine if any of them and the remaining ones should be considered.¹⁸ As such the Tribunal's determinations are on the preliminary issues of victim status or locus standi and the question of extraterritorial jurisdiction under the ECHR.¹⁹

The IPT held that the complaints were not res judicata as a refusal to look at each claim separately would be contrary to ECtHR case law and the Tribunal's duties according to RIPA 2000. The IPT found that such a refusal would undermine its own function of judicial oversight.²⁰ Consequently, the Tribunal determined that it will consider all domestic law complaints pursuant to section 65(2)(b) of RIPA 2000 so long as the claimants submit further information to demonstrate that they are potentially at risk of surveillance.²¹ Importantly, complaints will be considered regardless of whether the applicant in question was at any material time present in the UK or not.²² With regard to the human rights claims according to section 65(2)(a) of RIPA 2000, however, the IPT decided to only consider those made by persons

¹³ Kim n 7 above.

¹⁴ *ibid.*

¹⁵ n 1 above at [8]-[9].

¹⁶ *ibid* at [8]-[10], [24].

¹⁷ *ibid* at [28]-[29].

¹⁸ *ibid* at [11]-[12].

¹⁹ *ibid* at [13].

²⁰ *ibid* at [41].

²¹ *ibid* at [46]-[48].

²² *ibid* at [64].

situated in the UK because claimants who ‘do not enjoy a private life in the UK’ do not fall under the jurisdiction of the UK according to article 1 of the ECHR.²³ This is where the difference between the two kinds of applications gains traction.

A VICTIM STATUS

The first substantive part of the judgment deals with what the Tribunal calls the victim issue.²⁴ The IPT found that for the purposes of both domestic law complaints and human rights claims all applicants have standing if they provide further information explaining why, due to their personal situation, they are potentially at risk of surveillance under the relevant legislation.²⁵ This section discusses the Tribunal’s engagement with the ECtHR case law and the IPT’s own reasoning. It argues that the Tribunal’s conclusion is sound, but that its reasoning is not.

The IPT first outlines the relevant case law of the ECtHR in considerable detail.²⁶ The usual standard for the latter to consider an application is that an applicant be ‘directly effected’ by the alleged interference with a Convention right.²⁷ This is what it means for an applicant to be a victim of a rights violation according to article 34 of the ECHR. The Court justifies this by taking recourse to the Convention’s and – following from this – its own function: ‘...the Convention does not provide for the institution of an *actio popularis* and ... its [the Court’s] task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention...’.²⁸ However, the ECtHR has allowed for a nuanced approach whenever covert measures were at issue. It has, in its own words ‘... permitted general challenges to the relevant legislative regime in the sphere of secret surveillance in recognition of the particular features of secret surveillance measures and the importance of ensuring effective control and supervision of them.’²⁹

In *Zhakarov* the Court ‘harmonised’ its approach to the conditions in which an applicant can claim to be a victim of a violation of article 8 of the ECHR without

²³ *ibid* at [58], [61]-[64].

²⁴ *ibid* at [14]-[48].

²⁵ *ibid* at [46]-[48].

²⁶ *ibid* at [14]-[19]. The Tribunal does not distinguish between domestic law complaints and human rights claims.

²⁷ See, eg, *Klass v Germany* Series A No 28 at [36]-[38]; *Burden v United Kingdom* (2008) 47 EHRR 38 at [33].

²⁸ n 4 above at [164].

²⁹ *ibid* at [165]. See also n 1 above at [16].

having to prove that they had actually been subject to surveillance by introducing a two-tiered test regarding abstract complaints.³⁰ First, it needs to be established that laws and practices instituting secret surveillance indeed exist. Their existence is sufficient cause to make an application to the Court for all those to whom such measures might be applied without the need to show any risk of actual surveillance.³¹ An applicant need only establish that they belong to a class of persons that could be subjected to surveillance under the framework.³² This is the relevant standard for cases where there is no effective remedy against secret surveillance measures at the domestic level.³³ Second, the Court held that an applicant must show – in addition to the existence of practices of secret surveillance – that the applicant is ‘potentially at risk’ that intelligence services have compiled information concerning their private life.³⁴ This is the standard that the Court uses in cases where there is an effective domestic remedy. The latter standard can be classified as a mixed approach: it does allow for abstract challenges but requires applicants to show not only that the legislation might apply to them but that there is a potential risk of actual surveillance. In sum, the Court continues to allow abstract challenges of secret surveillance measures but differentiates what applicants have to establish according to whether there are effective domestic remedies available.

This harmonised approach is in line with the justification for allowing abstract challenges in cases involving secret surveillance, which was made explicit in *Kennedy v UK*.³⁵ The ECtHR named as the main reason for allowing abstract challenges in surveillance cases that ‘... secrecy of such measures does not result in the measures being effectively unchallengeable and outside the supervision of national judicial authorities and the Court.’³⁶ It thus appealed to the principle of effective oversight described above. The ECtHR then went on to consider whether there was judicial oversight available on the national level. *Kennedy* was a case lodged against the UK and the Court found that the higher standard of proof was applicable because of the

³⁰ n 4 above at [170]-[172].

³¹ *ibid* at [171].

³² *ibid*.

³³ *ibid*.

³⁴ n 4 above at [166].

³⁵ (2011) 52 EHRR 4 at [124]. See also n 4 above at [169].

³⁶ *ibid* at [124].

existence of the very Tribunal discussed here.³⁷ In *Zhakarov*, the Court held explicitly that the mixed approach where applicants need to show that they are ‘potentially at risk’ of surveillance is the relevant standard only where there are effective domestic remedies.³⁸ Wherever this is not the case applicants only need to show that the relevant law and practices might apply to them.³⁹

The IPT made clear at the outset that it is of an open mind regarding the standard of proof required, and inspired by the case law of the ECtHR.⁴⁰ The Tribunal’s conclusion is that it should follow the ECtHR and adopt the standard developed in *Kennedy*.⁴¹ It does so by extensively quoting *Zhakarov* and then concluding that ‘accordingly’ the same reasoning applies to proceedings before the IPT. There are two issues with the IPT’s approach. First, the ECtHR’s reasoning does not say anything about the standard a domestic court should apply but only refers to the situation the ECtHR finds itself in. This means that the IPT should have resorted to its own principled reasoning. Second, if the Tribunal had actually followed the ECtHR’s reasoning it should have come to a different conclusion. The IPT should have concluded that the applicants could challenge the legislative framework as such without showing a potential risk of surveillance because the IPT itself is a court of first instance and cannot rely on the existence of remedies to justify higher standards of access. As mentioned, the ECtHR in *Kennedy* allowed for the mixed standard requiring the applicant to show a ‘potential risk’ of surveillance precisely because the UK has a judicial mechanism in the form of the IPT.⁴² The harmonised approach in *Zhakarov* explicitly confirms this rationale.⁴³ If the IPT now adopts the (slightly) higher hurdle involving ‘potential risk’ of surveillance as opposed to the more generous standard of an actual abstract challenge of the legal framework to access the very procedures that gave rise to its justification in the first place, the purpose of the ‘potential risk’ version of the victim status is defeated.

None of this is to say that access to the IPT is not an effective domestic remedy, nor that the Tribunal’s conclusion is unsound. It is to say, however, that the Tribunal

³⁷ n 35 above at [185]-[190]. The IPT makes explicit reference to this fact: n 1 above at [17].

³⁸ n 4 above at [171].

³⁹ *ibid.*

⁴⁰ n 1 above at [14].

⁴¹ *ibid* at [19].

⁴² n 35 above at [125]-[129].

⁴³ n 4 above at [171].

should have carried out its own principled reasoning. For example, it could have pointed to a principle of integrity of the judicial process. That is, the IPT could have said that as a specialised tribunal whose judgments are not liable to judicial review it is ill equipped to consider abstract challenges even if the ECtHR's reasoning required them. Insofar as the Tribunal did not do so, *Human Rights Watch* is a missed opportunity. However, compared to the problems the Tribunal faces in its dealing with the issue of extraterritorial jurisdiction, this can only be described as a minor quibble.

A EXTRATERRITORIALITY

Noting that two of the six individuals whose claims were under consideration have never resided in the UK the Tribunal turned to extraterritoriality.⁴⁴ The IPT found that while all domestic law complaints would be considered, only the human rights claims of those individuals who were within the UK would be.⁴⁵ This section puts the issue of extraterritoriality into context where necessary and analyses the IPT's reasoning on the question. It argues that the Tribunal did not deal with the issue of extraterritoriality in a satisfactory way, dodging rather than resolving the question before it.

Article 1 of the ECHR provides that states '... shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention'. It is this provision that has led the ECtHR to address extraterritoriality in the interpretation of the term jurisdiction. The provision refers to the jurisdiction of a state, not the jurisdiction of a court.⁴⁶ In addition, the term jurisdiction has a particular meaning in international human rights law. It denotes a threshold criterion for the application of a particular human rights treaty and should not be confused with other meanings of jurisdiction in international law.⁴⁷ Accordingly, it is inaccurate or at least confusing to say – as the Tribunal does – that the result of its analysis of the ECtHR's case law on the extraterritorial application of the Convention is that the IPT lacks jurisdiction.⁴⁸ It would have been more helpful and also correct to say that the Convention is not

⁴⁴ n 1 above at [49]-[63].

⁴⁵ *ibid* at [60]-[62].

⁴⁶ n 5 above 19-20.

⁴⁷ n 5 above 19-41; see also S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 LJIL 857, 862-864.

⁴⁸ n 1 above at [62].

applicable because the claimants are not within the jurisdiction of the UK and that they thus do not have a claim in the first place. The correct question is whether the UK owes individuals abroad obligations arising from the Convention or not.⁴⁹ The fact that (in the view of the Tribunal) the UK does not owe such obligations is the reason why the IPT dismisses the claims and the fact that it sees itself as not having jurisdiction is parasitic upon this former conclusion. Using the term ‘jurisdiction’ in different senses without clarifying this is unhelpful and should have been avoided.

Turning to the IPT’s substantive finding on jurisdiction it is useful to begin with a brief overview of the ECtHR’s case law on extraterritoriality to date. The Court starts from the assumption that there is a ‘territorial principle’, that is, it deems jurisdiction to be primarily exercised on national territory.⁵⁰ In the cases following *Banković v Belgium* (*Banković*),⁵¹ the ECtHR developed what it calls exceptions to this principle. This is how it arrived at the statement in *Al-Skeini v UK* where it found that there are two exceptions to the principle: the personal one and the spatial one.⁵² The personal model of extraterritorial jurisdiction refers to a situation where state agents exercise physical power or control over a person abroad. The scenario used as the usual backdrop is arrest or detention.⁵³ In *Al-Skeini*, which among other situations concerned the killing of civilians during patrols, the Court further specified that the state must exercise some or all public powers usually exercised by government.⁵⁴ The spatial model, on the other hand, refers to a situation where a state has effective control over an area outside its territory as a result of military action, usually belligerent occupation.⁵⁵ Most recently, the Court seems to have abandoned a strict distinction between the personal and the spatial model and instead focuses on what kind of power and control was being exercised in order to establish jurisdiction.⁵⁶ The ECtHR reached these current principles by way of a rather mysterious journey, using slightly different definitions of jurisdiction at different times, usually without

⁴⁹ Noted correctly by the Respondents, paraphrased *ibid*, at [49] and the Tribunal *ibid* at [52].

⁵⁰ *Banković v Belgium* (2007) 44 EHRR SE5 at [59]; *Al-Skeini v UK* (2011) EHRR 18 at [132].

⁵¹ *Banković v Belgium* n 42 above.

⁵² n 42 above at [133]-[139].

⁵³ *Al-Skeini* n 50 above at [133]-[136]. See also *Hassan v UK* ECtHR 16 Sep 2014.

⁵⁴ n 49 above at [138].

⁵⁵ *ibid* at [135].

⁵⁶ *Jaloud v Netherlands* (2015) 60 EHRR 29; see also L. Raible, ‘The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should Be Read as Game Changers’ (2016) EHRLR 161.

justification and occasionally contradicting itself.⁵⁷ It is especially striking that the Court has been unwilling to rely explicitly on the values underpinning the principles it developed.⁵⁸

The above summary points to two important facts. First, the ECtHR has not yet decided a case regarding article 8 of the Convention and mass surveillance abroad. Second, and perhaps as a result of the first point, the exceptions the Court currently operates with do not easily lend themselves to guide the application of the ECHR in cases where a state subjects individuals located abroad to surveillance. For example, does the interception and storage of information regarding the private life of an individual amount to physical power and control of that individual? Or does the tapping of cables result in control over an area? Both questions must be answered in the negative, albeit with some unease. After all, it seems to make little difference to the individual who is subjected to surveillance if their information is intercepted and processed by a state where one happens to reside or by some other state.⁵⁹ A moral distinction between these two cases is implausible, particularly if states that practice surveillance share information.⁶⁰

Additionally, when the Tribunal's finding is thought through the result is as follows: the right to the protection of one's private and family life would be virtually inapplicable to electronic communications. The reason is that there is only ever one state party to the ECHR that would owe individuals obligations under the Convention while all others – all the states one does not reside in – could subject any individual abroad to unfettered surveillance. It is unsurprising that the IPT found that the UK did not have jurisdiction over individuals abroad simply because it may have intercepted their information,⁶¹ if only because the ECtHR case law is inconclusive at best.⁶² But the result is deeply disturbing.

Regarding the cases decided by the ECtHR that the Tribunal chose to analyse there is one particularly questionable move. The IPT cites *Chagos Islanders v UK*⁶³ as the most recent authoritative statement of the principles on authority and jurisdiction

⁵⁷ See the examples in *Al-Skeini v UK* n 50 above, Concurring Opinion of Judge Bonello at [5].

⁵⁸ See below 15-17.

⁵⁹ See also M. Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in a Digital Age' (2015) 56 *Harvard International Law Journal* 81-146, 118-19.

⁶⁰ See further *ibid* 123-24.

⁶¹ Milanovic n 7 above.

⁶² n 1 above at [61].

⁶³ (2013) 56 EHRR SE15.

abroad and quotes the relevant passages.⁶⁴ This is not entirely accurate, however. In *Chagos Islanders* the Court did not ultimately decide admissibility based on the issue of jurisdiction,⁶⁵ which makes the cited passages an obiter dictum. Where the ECtHR did deal with extraterritoriality it addressed a rather niche aspect: the difference between articles 1 and 56 of the ECHR. The latter is a provision rooted in Europe's colonial history and stipulates that the Convention only applies to territories for the international relations of which a state is responsible on a permanent basis – in other words colonial territories — if the contracting state makes a declaration to that effect. Furthermore, throughout its treatment of the issue of jurisdiction, the Court relies on *Al-Skeini*, just as it does in other judgments on extraterritoriality.⁶⁶ This confirms that the latter remains the authoritative summary of the ECtHR's views on jurisdiction and that *Chagos Islanders* has not changed this.⁶⁷ The IPT's choice to represent the ECtHR's case law based on a truncated version employed in *Chagos Islanders* rather than the more comprehensive and also decisive list in *Al-Skeini* is thus questionable. All the same, but not reflecting well on the IPT either, this choice does not seem to have impacted the Tribunal's reasoning.

A further problematic aspect of the IPT's judgment is the way it engages with *Banković v Belgium*. The IPT only mentions it once with a gesture at the fact that the analogy to the present case was close,⁶⁸ which is a little cryptic.⁶⁹ In *Human Rights Watch* the issue is whether a person potentially subjected to surveillance is within the jurisdiction of the UK when the UK's agents intercept and store data on UK territory even though the person whose data is concerned is not within that territory. In *Banković* the ECtHR had to consider if the same is the case for civilians killed in a bombing by the respondent states of a television station in Belgrade. How these two scenarios are similar would need to be established. Unfortunately, the Tribunal does no such thing and thus bases its findings on not very much reasoning at all.

There are more complaints to be made with regard to the reasoning of the Tribunal in the few paragraphs that deal with jurisdiction. And the criticisms that the present

⁶⁴ n 1 above at [53], the name of the case is misquoted as 'Chagos Island v UK'.

⁶⁵ n 63 above at [75]-[76].

⁶⁶ See, eg, n 53 above at [74]; n 56 above at [139].

⁶⁷ n 56 above 163.

⁶⁸ n 1 above at [58].

⁶⁹ Kim n 7 above.

author is aware of are well founded.⁷⁰ What is clear even after this brief discussion is that the Tribunal does not engage in any depth with the ECtHR's case law on the extraterritorial application of the Convention. In order to elucidate what the Tribunal should have done in this regard, a closer look at the quality and depth of the ECtHR's reasoning is warranted. The remainder of this note argues that the reason for the Tribunal's failures in *Human Rights Watch* is a lack of proper engagement with the underlying principles at stake. It introduces a framework of understanding principled reasoning that illuminates what the IPT – and the ECtHR – should have done. Finally, it shows that the quality of the IPT's engagement with ECtHR case law in *Human Rights Watch* correlates with how principled the ECtHR's reasoning in a given matter is in the first place.

A PRINCIPLED REASONING

The fundamental problem of both parts of *Human Rights Watch* is the Tribunal's failure to engage properly with the underlying principles. With regard to victim status, the IPT considered the ECtHR's case law carefully and at length but still draws the wrong conclusion. In the part of the judgment dealing with extraterritoriality, the IPT does not engage with case law of the ECtHR in a similarly meaningful way and instead relies on a rather cursory analysis of the relevant cases.⁷¹ Conceptualising what the Tribunal and – at least as far as extraterritoriality is concerned – the ECtHR should have done requires a framework that explains the place of principled reasoning in human rights adjudication. To this end, consider the following.

'Principled reasoning' denotes reasoning that relies on principles. Principles, in turn, are understood here to mean standards that are observed because they are a requirement of justice or of morality more generally.⁷² Unlike legal rules, principles do not necessitate action but only provide one reason among several potential ones that points in one direction.⁷³ In addition, it is posited that applying (legal) principles requires an enquiry into the values they uphold.⁷⁴ Together with values, principles so

⁷⁰ Milanovic n 7 above; *ibid*.

⁷¹ Kim n 7 above.

⁷² R. Dworkin, *Taking Rights Seriously* (London: Duckworth 1977) 22. For a critique of this understanding of principles see, eg, H.L.A. Hart, *The Concept of Law* (2nd edn, Oxford: Oxford University Press 1994) 259-263.

⁷³ Dworkin n 72 above 24-28.

⁷⁴ A. Green, 'A Philosophical Taxonomy of European Human Rights Law' (2012) EHRLR 71, 73.

underpinned can then be used to justify rules.⁷⁵ Rules guide action in an all-or-nothing fashion; either a rule is applicable and supplies a full answer or it is not and in that case does not contribute anything.⁷⁶ That is, unlike principles rules do not cater to considering conflicting issues. Rather, a rule is the *result* of considering all relevant principles and values that might justify it.

Take the ECtHR's consideration of the appropriate standard for victim status under the Convention. The Court says that it does 'not normally' deal with general review of legislation.⁷⁷ This suggests that the Court sees this as a principle that points in one direction but can be trumped by more important considerations. Accordingly, the ECtHR goes on to outline other, potentially more important, principles that could point in another direction in cases where secret measures are the subject of an application. In the case of secret surveillance, the principle of effective oversight is found to be the more important principle on balance.⁷⁸

The ECtHR does not appeal to a relationship between rule and exceptions. On the contrary, it seems aware of the different considerations that point in different directions and outlines them in this fashion. On the one hand, there is the principle that the Court adjudicates individual complaints based on concrete grievances. On the other hand, there is the principle that the ECtHR should ensure effective oversight when it comes to secret surveillance because the latter poses a threat to the right to protection of private life in article 8 of the ECHR. Put differently, the Court engages in principled reasoning about the victim status in secret surveillance cases. The ECtHR reaches its conclusions on how an individual needs to be affected by a particular system or measure by considering different principles that pull in different directions. Finally, it infers the rule on what an applicant must show in order to count as a victim from these principles.

The IPT engages with the ECtHR's case law on victim status in some depth. However, the Tribunal does not engage with the *reasoning* of the ECtHR but only with the result. This would explain why it does not grapple with the fact that the principles employed by the Court do not actually justify the Tribunal's conclusions. In other words, the IPT does not recognise that a first domestic instance should employ

⁷⁵ *ibid* 72.

⁷⁶ Dworkin n 72 above 24.

⁷⁷ n 4 above at [164].

⁷⁸ *ibid* at [165].

different principles than the ECtHR in order to justify that the applicant must show that they are ‘potentially at risk’ that intelligence services have compiled information concerning their private life.⁷⁹ Instead of ignoring this inconvenient state of affairs, the Tribunal should have engaged in its own principled reasoning if it wanted to justify why this standard is an appropriate rule.

Turning now to the issue of extraterritoriality, it is again useful to start with an analysis of the ECtHR’s reasoning. Green distinguishes between principles and rules in order to elucidate that Convention rights are best understood as principles.⁸⁰ However, there is no reason to restrict the use of the distinction as such to the interpretation of Convention *rights*.⁸¹ In fact, the case law dealing with extraterritoriality in light of article 1 of the ECHR is an example to the contrary. The provision reads and operates like a generalised rule:⁸² ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention.’ However, because it is a generalisation it still needs to be interpreted by recourse to the principles and values that justify it.

Seemingly aware of the need for further interpretation and thus aiming to duly justify the rule, the ECtHR speaks of ‘general principles relevant to jurisdiction’⁸³ when ascertaining what jurisdiction means. However, the Court does not actually operationalize its ‘principles’ as such. The Court starts from the assumption that there is a ‘territorial principle’, that is, it deems jurisdiction to be primarily exercised on national territory.⁸⁴ As described above, the ECtHR has developed what it calls ‘exceptional circumstances capable of giving rise to the exercise of jurisdiction... outside territorial boundaries’⁸⁵. However, framing competing considerations as exceptions⁸⁶ to a principle does not sit easily with the understanding of principles adopted here. A principle does not have exceptions, only rules do.⁸⁷ Instead,

⁷⁹ See above 8-9.

⁸⁰ n 74 above 79-80.

⁸¹ See G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press 2009) 80-98, where he proposes a similar approach to the doctrine of the ‘margin of appreciation’ emphasising *reasons* and *principles* underlying the ECtHR’s conclusions. See also B. Çali, ‘On Interpretivism and International Law’ (2009) 20 EJIL 805 on the relevance of interpretivism in international law generally.

⁸² cf n 74 above 80.

⁸³ See, eg, *Al-Skeini* n 50 above at [130].

⁸⁴ *Banković* n 50 above at [59]; *Al-Skeini* n 50 above at [131]-[132].

⁸⁵ *Al-Skeini* n 50 above at [132].

⁸⁶ A term used explicitly in *ibid* at [133].

⁸⁷ Dworkin n 72 above 24-25.

principles are requirements of justice or morality more generally that point in one direction and have a dimension of weight in the sense that they can be deemed more or less important depending on the salience of the underpinning value in a given case.⁸⁸

Accordingly, the Court should be engaging, for example, with the question why the generalised rule in article 1 of the ECHR does not rely on territory and what the consequences are for the meaning of jurisdiction.⁸⁹ Applying this structure of reasoning to the area of extraterritoriality of the right to protection of one's private life should – in the author's view – take the following form.⁹⁰ One of the overarching values regarding Convention rights is the equal moral status of each individual.⁹¹ Two of many principles deriving from equality are worth considering with regard to the extraterritorial application of the Convention. First, Convention rights by protecting everyone equally both need and bind public authorities that have power over areas of human activity because this power allows them to respect equality in the first place.⁹² Second, the term jurisdiction (as opposed to territory) should be understood to ensure that cases where territory does not make a moral difference are treated alike.⁹³ That is, if a state has the same kind of power regardless of whether the victim of a human rights violation is within or outside its territory said state should be held to the same standards under the ECHR in both situations.

The next question is what exactly needs to be within the power of public institutions. The IPT actually grapples with this question in *Human Rights Watch* but does not go beyond pointing out that the ECtHR has only ruled on power over property and that information does not count as such.⁹⁴ What the Tribunal (and the ECtHR, for that matter) does not recognise is that the relevant value here is again equality, but that the salient principle needs to relate to articles 1 (jurisdiction) and 8 (privacy) of the Convention. In conjunction, equality and the right to protection of

⁸⁸ *ibid* 26-27.

⁸⁹ As the ECHR is an international treaty, the starting point of interpretation according to international law is articles 31 and 32 of the Vienna Convention on the Law of Treaties. The reasoning suggested here would be accommodated by article 31 (1) because it is an interpretation of the ordinary meaning of the term jurisdiction in the light of the object and purpose of the ECHR.

⁹⁰ For another example of reasoning appealing to values and principles see n 47 above.

⁹¹ n 81 above 114-117.

⁹² Versions of this view are defended in n 47 above 862-866 and n 56 above 166-168. See also n 81 above 117.

⁹³ For a similar view regarding the role of citizenship rather than territory see n 59 above 87-101.

⁹⁴ n 1 above at [56]-[58].

one's private life suggest that it should not make a difference what part of the private life is involved or which form of information is at stake. It follows that the power of public institutions is relevant regardless of whether it is a power to physically stop and search individuals or whether it is to intercept digital communications. Accordingly, the IPT should have concluded that individuals whose communications might be intercepted by UK authorities are within UK jurisdiction for the purposes of applying article 8 of the Convention.

However, the ECtHR when it has dealt with extraterritoriality in the past has not employed any reasoning of this kind. Instead, the Court

spawned a number of 'leading' judgments based on a need-to-decide basis, patch-work case law at best. ... As the Court has, in these cases, always tailored its tenets to sets of specific facts, it is hardly surprising that those tenets then seem to limp when applied to sets of different facts.⁹⁵

The ECtHR fashions what it calls principles to accommodate specific facts rather than asking what values underpin them. Despite the use of the term 'principle', the Court's reasoning when it comes to extraterritoriality is not actually principled in the sense employed here. This is not to say that all judgments by the ECtHR on this issue reached the wrong conclusion. Rather, the complaint is that the structure of the reasoning itself is problematic. As will be discussed next, this has significant ramifications beyond the case law of the Court.

The IPT was faced with the following situation when deciding *Human Rights Watch*. The Court had not yet made any pronouncements on a situation of surveillance abroad and there are no principles, let alone values, to discern what article 1 of the Convention means in different circumstances. This suggests that the admittedly rather lacklustre reasoning and findings of the Tribunal do not only turn on the fact that the ECtHR has just not yet decided a case concerning extraterritorial mass surveillance. Instead, the actual problem is the much deeper one of a lack of principled reasoning.⁹⁶ A certain frustration about this state of affairs shows when the IPT states that it cannot find that the individuals residing abroad were within the jurisdiction of the UK because the ECtHR had failed to clearly decide that they are.⁹⁷ Given all this, a one-

⁹⁵ *Al-Skeini* n 50 above, Concurring Opinion of Judge Bonello at [5].

⁹⁶ On the place of principled reasoning with regard to ECtHR judgments generally see n 81 above 83-84.

⁹⁷ n 1 above at [61].

issue tribunal such as the IPT can hardly be expected to stand in for the ECtHR when it comes to fleshing out underlying principles and values.

Comparing the case law on extraterritoriality to the cases on victim status renders the lack of principled reasoning even more evident. As discussed above, the Court looks at article 34 of the ECHR, concluding that it is a principle and that it can be trumped by other, more important or salient, principles. That is, the ECtHR considers the function of the complaint mechanism and concludes that it is underpinned by at least two different principles: the righting of wrongs in case of interferences and that the Court should provide effective oversight. Such reasoning gives domestic courts, including the IPT, a handle on the matter. They have principles at their disposal and can use them to appraise facts, which is exactly what the Tribunal did. The fact that it failed to apply them correctly can be criticised but it does not change that the IPT engaged meaningfully with the case law.

Against this background, it seems appropriate to stop and think before attributing the Tribunal's failures to the Tribunal alone. The ECtHR is certainly to blame as much for the disappointing outcome regarding extraterritoriality in *Human Rights Watch*. However, criticising either court equally risks remaining meaningless as long as we – as commentators – are ourselves unwilling to commit to answering hard questions in a principled way. Extraterritoriality is an area where many assumptions on human rights law, including the Convention, can no longer be maintained. For example, if territory is off the table as a means to identify the bearer of human rights obligations, the question becomes: what is valuable about applying human rights and what value justifies which part of their application? But this question, or other questions like it, rarely figures in commentary on the extraterritorial application of the Convention and no amount of criticism of individual judgments by the IPT or the ECtHR makes up for this.

A CONCLUSION

The IPT in *Human Rights Watch* found mostly for the claimants. It held that its previous findings did not preclude further proceedings in this case, provided that the claimants supply further information, and the Tribunal adopted a generous approach to the issue of victim status. While the reasoning on which the IPT's approach to the victim status of the claimants rested was questionable, the result was not. Further, the

hope was that the IPT in *Human Rights Watch* would clarify the extraterritorial application of the ECHR in cases concerning mass surveillance. However, the Tribunal never got around to that; the case law so far delivered by the ECtHR on the matter of extraterritoriality never did and still does not allow for it. The underlying problem is not that the Tribunal was unwilling to engage with relevant cases but the lack of principled reasoning. This is an unhappy state of affairs, not only because the wait for the much needed clarification continues, but also because it leaves much to be desired in terms of progress in the matter generally speaking.